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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 CRAIG TOBELER, ) 3:09-cv-0309-ECR (RAM)  
9 Plaintiff, )  
10 vs. )  
11 MICHAEL J. ASTRUE, )  
12 Commissioner of Social Security, )  
13 Defendant. )

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**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

14 This Report and Recommendation is made to the Honorable Edward C. Reed, Jr.,  
15 United States District Judge. The action was referred to the undersigned Magistrate Judge  
16 pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

17 Before the court is Plaintiff Craig Tobeler's (Plaintiff) Motion to Remand the decision  
18 of the Commissioner. (Doc. #16.)<sup>1</sup> Defendant Commissioner opposed the motion and filed  
19 a Cross-Motion for Summary Judgment to affirm the Commissioner's final decision.  
20 (Doc. #19.) Plaintiff replied. (Doc. #25.) After a thorough review, the court recommends  
21 that Plaintiff's motion be denied, and Defendant's motion be granted.

22 **I. FACTUAL AND PROCEDURAL BACKGROUND**

23 At the time of the Commissioner's final decision, Plaintiff was a forty-eight-year-old  
24 man who had not graduated from high school but completed the general education  
25 development (GED) course. (Tr. 30-31.) Plaintiff completed a vocational training program  
26 in heating, air conditioning, and refrigeration as well as a flooring apprenticeship, and

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28 <sup>1</sup> Refers to court's docket number.

1 worked on and off in the carpet and flooring industry until 1997, after which time he had a  
 2 few side jobs. (*Id.* at 30-33.) He has not worked since approximately 2003. (*Id.* at 33.)  
 3 Plaintiff filed an application for Disability Insurance Benefits (DIB) on January 18, 2006,  
 4 asserting that depression, anxiety disorder, attention deficit disorder (ADD), and attention  
 5 deficit hyperactivity disorder (ADHD) caused him to be permanently and completely disabled  
 6 since January 1, 1999. (*Id.* at 78-80, 90-91.) The date last insured is September 30, 1999.  
 7 (*Id.* at 28-29.) The Commissioner denied Plaintiff's application initially and upon  
 8 reconsideration. (*Id.* at 50-53, 58-61.) On April 22, 2007, Plaintiff requested a hearing to  
 9 challenge the Commissioner's determination. (*Id.* at 62.)

10 Plaintiff, represented by counsel, appeared and testified at the hearing before the  
 11 Administrative Law Judge (ALJ) on March 19, 2008. (Tr. 25-43, 62.) The ALJ followed the  
 12 five-step procedure for evaluating disability claims, set forth in 20 C.F.R. § 404.1520, and  
 13 issued a written decision on June 25, 2008, finding Plaintiff "not disabled" as defined in the  
 14 Social Security Act and denying the claim for DIB. (*Id.* at 9-20.) Plaintiff appealed the  
 15 decision, and the Appeals Council denied review. (*Id.* at 1-4.) Thus, the ALJ's decision  
 16 became the final decision of the Commissioner. (*Id.*)

17 Plaintiff now appeals the decision to the district court, in which he argues: (1) the ALJ  
 18 erred by ignoring lay witness evidence; (2) the ALJ improperly rejected the opinion of a  
 19 treating doctor; (3) the ALJ erroneously rejected Plaintiff's credibility; (4) the ALJ failed to  
 20 make complete findings at Step 2; and (5) the ALJ erred by failing to take vocational expert  
 21 testimony. (Pl.'s Mot. for Remand (Doc. # 16).)

22 **II. STANDARD OF REVIEW**

23 The court must affirm the ALJ's determination if it is based on proper legal standards  
 24 and the findings are supported by substantial evidence in the record. *Stout v. Comm'r Soc.*  
 25 *Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006). "Substantial evidence is more than a mere  
 26 scintilla but less than a preponderance." *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir.  
 27 2005)(internal quotation marks and citation omitted). "It means such relevant evidence as

1 a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*,  
 2 402 U.S. 389, 401 (1971)(quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229  
 3 (1938)). To determine whether substantial evidence exists, the court must look at the record  
 4 as a whole, considering both evidence that supports and undermines the ALJ’s decision.  
 5 *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995)(citation omitted). “However, if evidence  
 6 is susceptible of more than one rational interpretation, the decision of the ALJ must be  
 7 upheld.” *Id.* at 749 (citation omitted). The ALJ alone is responsible for determining  
 8 credibility and for resolving ambiguities. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

9 The initial burden of proof rests upon the claimant to establish disability. *Howard v.*  
 10 *Heckler*, 782 F.2d 1484, 1486 (9th Cir. 1986)(citations omitted); 20 C.F.R. § 404.1512(a). To  
 11 meet this burden, a plaintiff must demonstrate an “inability to engage in any substantial  
 12 gainful activity by reason of any medically determinable physical or mental impairment which  
 13 can be expected ... to last for a continuous period of not less than 12 months ....” 42 U.S.C. §  
 14 423 (d)(1)(A).

15 **III. DISCUSSION**

16 **A. SEQUENTIAL PROCESS AND ALJ FINDING**

17 The Commissioner has established a five-step sequential process for determining  
 18 whether a person is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987); *see also* 20  
 19 C.F.R. §§ 404.1520, 416.920. If at any step the Social Security Administration (SSA) can  
 20 make a finding of disability or nondisability, a determination will be made and the SSA will  
 21 not further review the claim. *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003); *see also* 20 C.F.R.  
 22 §§404.1520(a)(4), 416.920(a)(4).

23 In the first step, the Commissioner determines whether the claimant is engaged in  
 24 “substantially gainful activity”; if so, a finding of nondisability is made and the claim is  
 25 denied. *Yuckert*, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b). If the claimant is not engaged  
 26 in substantially gainful activity, the Commissioner proceeds to step two. 20 C.F.R. §  
 27 416.920(a).

1       The second step requires the Commissioner to determine whether the claimant's  
2 impairment or combinations of impairments are "severe." *Yuckert*, 482 U.S. at 140-41. An  
3 impairment is severe if it significantly limits the claimant's physical or mental ability to do  
4 basic work activities. 20 C.F.R. § 416.920(c). If a claimant's impairment is so slight that it  
5 causes no more than minimal functional limitations, the Commissioner will find that the  
6 claimant is not disabled. 20 C.F.R. § 404.1520. If, however, the Commissioner finds that the  
7 claimant's impairment is severe, the Commissioner proceeds to step three.

8       In the third step, the Commissioner determines whether the impairment is equivalent  
9 to one of a number of specific impairments listed in 20 C.F.R. pt. 404, subpt. P, app.1 (Listed  
10 Impairments). The Commissioner presumes the Listed Impairments are severe enough to  
11 preclude any gainful activity. 20 C.F.R. § 416.925(a). If the claimant's impairment meets or  
12 equals one of the Listed Impairments and is of sufficient duration, the claimant is  
13 conclusively presumed disabled. 20 C.F.R. § 404.1520(d). If the claimant's impairment is  
14 severe, but does not meet or equal one of the Listed Impairments, the Commissioner  
15 proceeds to step four. *Yuckert*, 482 U.S. at 141.

16       In step four, the Commissioner determines whether the claimant can still perform  
17 "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can still do past  
18 relevant work, then he or she is not disabled for purposes of the Act. 20 C.F.R. § 404.1520(f).  
19 If, however, the claimant cannot perform past relevant work, the burden shifts to the  
20 Commissioner, *Yuckert*, 482 U.S. at 144, to establish, in step five, that the claimant can  
21 perform work available in the national economy. *Yuckert*, 482 U.S. at 141-42; *see also* 20  
22 C.F.R. §§ 404.1520(e), 404.1520(f), 416.920(e), 416.920(f). Application of steps four and five  
23 requires the Commissioner to review the claimant's residual functional capacity and the  
24 physical and mental demands of the work he or she did in the past. 20 C.F.R. §  
25 404.1520(f),(g). "Residual functional capacity" (RFC) is what the claimant can still do despite  
26 his or her limitations. 20 C.F.R. § 404.1545. If the claimant cannot do the work he or she did  
27 in the past, the Commissioner must consider the claimant's RFC, age, education, and past  
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1 work experience to determine whether the claimant can do other work. *Yuckert*, 482 U.S. at  
 2 141-42. If the Commissioner establishes that the claimant can do other work which exists  
 3 in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566.

4 In the present case, the ALJ applied the five-step sequential evaluation process and  
 5 found, at step one, that Plaintiff did not engage in substantial gainful activity during the  
 6 period of his alleged onset date of January 1, 1999 through his date last insured of September  
 7 30, 1999. (Tr. 14.) At step two, the ALJ found that it was established that Plaintiff is severely  
 8 impaired by a depressive disorder which caused significant limitation in Plaintiff's ability to  
 9 perform basic work activities. (*Id.*) At step three, the ALJ concluded through the date last  
 10 insured that Plaintiff did not have an impairment or combination of impairments that met  
 11 or medically equaled one of the Listed Impairments. (*Id.* at 15.) At step four, the ALJ  
 12 determined through the date last insured that Plaintiff had the RFC to perform the full range  
 13 of medium work as defined in 20 C.F.R. § 404.1567(c), but was unable to return to any of his  
 14 past relevant work. (*Id.* at 15-19.) At step five, the ALJ concluded that considering Plaintiff's  
 15 age, education, work experience, and RFC, there were jobs that existed in significant numbers  
 16 in the national economy that Plaintiff could have performed. (*Id.* at 19.) In conclusion, the  
 17 ALJ determined that a finding of "not disabled" was directed by Medical-Vocational Rule  
 18 203.31. (*Id.* at 20.)

19 **B. EVALUATION OF LAY WITNESS EVIDENCE**

20 Plaintiff asserts the ALJ improperly failed to consider and address lay witness evidence  
 21 from Plaintiff's wife and former employer. (Doc. #16 10-12.) Defendant contends the lay  
 22 witness evidence was neither relevant nor probative of the relevant time period and is  
 23 therefore not competent evidence required to be discussed by the ALJ. (Def.'s Cross-Mot. for  
 24 Summ. J. (Doc. # 19) 6-7.) Defendant further argues that the failure to consider the lay  
 25 witness testimony was harmless error given the substance of the reports and the ALJ's finding  
 26 regarding Plaintiff's credibility. (*Id.*)

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1 Lay witness testimony as to a claimant's symptoms is competent evidence that an ALJ  
 2 must take into account, unless he or she expressly determines to disregard such testimony  
 3 and gives reasons germane to each witness for doing so. *Nguyen v. Chater*, 100 F.3d 1462,  
 4 1467 (9th Cir. 1996)(emphasis omitted) (citations omitted). The ALJ can properly reject lay  
 5 witness statements if there are inconsistencies between the statements and the medical  
 6 evidence and when lay witness statements describe symptoms that are not documented in the  
 7 claimant's medical records. *Bayliss*, 427 F.3d at 1218 (citing *Lewis v. Apfel*, 236 F.3d 503,  
 8 511 (9th Cir. 2001)).

9 Plaintiff's wife completed a third-party report describing how Plaintiff's impairments  
 10 limited his ability to function. (Tr. 129-136.) Plaintiff's wife stated that Plaintiff starts her  
 11 vehicle, prepares her coffee in the morning, and is able to do chores such as vacuuming,  
 12 delivering bills, shopping, and walking and feeding the dog, but on some occasions he is not  
 13 able to get out of the house, or cannot do these activities because of mental anxiety or  
 14 depression. (*Id.* at 129-133.) She indicated that he has difficulty functioning in public places  
 15 and with maintaining his temper. (*Id.* at 130.) Plaintiff spends time with others skiing, talks  
 16 with family a couple of times a month, and does not have problems getting along with family,  
 17 friends and neighbors. (*Id.* at 133-134.) Plaintiff sometimes needs to be reminded to go  
 18 places, is unable to control his mind, experiences memory loss, has difficulty concentrating,  
 19 confuses instructions, and has conflicts with others. (*Id.*) Plaintiff has been fired or laid off  
 20 from a job because of his temper and loudness. (*Id.* at 135.) He experiences anxiety/panic  
 21 disorders on a daily basis, and there are days when Plaintiff will sleep all day and has no  
 22 motivation. (*Id.* at 135-136.)

23 Plaintiff's former employer, George Bandy, submitted a letter regarding his knowledge  
 24 of Plaintiff's problems. (Tr. 137-140.) Mr. Bandy has known Plaintiff for twenty-five years.  
 25 (*Id.* at 138.) Plaintiff went to work for Mr. Bandy's flooring company in the early 1980's.  
 26 (*Id.*) About a year into this employment, Mr. Bandy started receiving complaints about  
 27 Plaintiff's temper from other employees and customers. (*Id.*) There was an instance where  
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1 Plaintiff ran someone off the road in a company vehicle and knocked their window out. (*Id.*  
 2 at 139.) Plaintiff became more violent in later employment periods with Mr. Bandy. (*Id.*)  
 3 Mr. Bandy admits that he had little contact with Plaintiff until he received the request that  
 4 he write a letter on Plaintiff's behalf. (*Id.* at 140.)

5 The ALJ failed to address the lay witness statements of Plaintiff's wife and former  
 6 employer. In hindsight, the Commissioner suggests that the statements were irrelevant  
 7 because they did not specifically address the relevant time period. The ALJ has erred when  
 8 he fails to discuss lay witness testimony that is favorable to the claimant. *See Stout*, 454 F.3d  
 9 at 1056 (citations omitted). The Ninth Circuit has stated: “[W]e, along with our sister  
 10 circuits, have consistently reversed the Commissioner's decisions for failure to comment on  
 11 such competent testimony.” *Id.*

12 Because the ALJ completely ignored lay witness testimony regarding how Plaintiff's  
 13 impairment limited his ability to work, there was nothing in the record for the court to  
 14 review to determine whether the ALJ's decision was adequately supported. *See Carmickle*  
 15 *v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1163 (9<sup>th</sup> Cir. 2008). The ALJ's failure to  
 16 address the lay witness statements or to make an express determination and set forth reasons  
 17 for disregarding the statements was in error. Under these circumstances, a heightened  
 18 harmless error standard applies, such that “a reviewing court cannot consider the error  
 19 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the  
 20 testimony, could have reached a different disability determination.” *Stout*, 454 F.3d at 1056.

21 Here, if fully credited, the lay witness evidence, when viewed in conjunction with the  
 22 evidence the ALJ properly considered, does not undermine the ALJ's determination of no  
 23 disability. Mr. Bandy's letter merely corroborates Plaintiff's own statements that he had a  
 24 temper which resulted in losing his job. (Tr. 32-33.) Mr. Bandy admitted that he has had  
 25 little contact with Plaintiff until the time it was requested that he write a letter (*Id.* at 140),  
 26 indicating that he does not have particular knowledge regarding Plaintiff's limitations during  
 27 the period at issue. In addition, the limitations reasonably supported by Plaintiff's wife's  
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1 statement corroborated Plaintiff's statements and were covered in the ALJ's findings. The  
 2 ALJ recognized that Plaintiff had a severe impairment in the form of a depressive disorder  
 3 which caused significant limitation on Plaintiff's ability to perform basic work activities. (Tr.  
 4 14.) The ALJ noted that Plaintiff had been seen for depression, was not sleeping well, and did  
 5 not want to deal with his friends. (*Id.* at 16.)

6 Moreover, the court has found below that the ALJ properly rejected the opinion of  
 7 Plaintiff's treating physician, Dr. Ridenour (*infra*, III.C), and properly discredited Plaintiff's  
 8 credibility (*infra*, III.D). The ALJ's legally sufficient adverse credibility determination as to  
 9 Plaintiff's own statements regarding the extent of his impairments supports a finding of  
 10 harmless error because the ignored lay witness evidence merely corroborated Plaintiff's own  
 11 account. In *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880 (9th Cir. 2006), the court recognized  
 12 that there are cases in which the failure to consider lay witness testimony is harmless.  
 13 *Robbins*, 466 F.3d at 885. There, the court determined that the ignored lay witness  
 14 testimony of the claimant's son directly supported the claimant's own testimony and claim  
 15 for disability, but determined that the ALJ had not made a legally sufficient adverse  
 16 credibility finding with respect to the claimant, and as a result the error could not be found  
 17 to be harmless. *Id.* Here, because the ignored lay witness testimony of Plaintiff's wife and  
 18 former employer, even if accepted as true, merely corroborated Plaintiff's own testimony,  
 19 which was deemed incredible by the ALJ, the error in failing to discuss the lay witness  
 20 evidence is harmless. Remand would therefore be futile. Consequently, the court is confident  
 21 that a reasonable ALJ, fully crediting the testimony of the lay witnesses, would not have  
 22 reached a different disability determination.

23 **C. REJECTION OF TREATING PHYSICIAN'S OPINION**

24 Next, Plaintiff argues that the ALJ improperly rejected the opinion of his treating  
 25 physician, Dr. Ridenour. (Doc. # 16 12-16.) Defendant, on the other hand, contends that  
 26 the ALJ's rejection of Dr. Ridenour's medical opinion was properly supported by clear and  
 27 convincing reasons. (Doc. # 19 7-10.)

1        “To reject an uncontradicted opinion of a treating or examining doctor, an ALJ must  
 2 state clear and convincing reasons that are supported by substantial evidence.” *Bayliss*, 427  
 3 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-31). On the other hand, “[i]f a treating or  
 4 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only  
 5 reject it by providing specific and legitimate reasons that are supported by substantial  
 6 evidence.” *Id.* The ALJ need not accept the opinion of any medical source, including a  
 7 treating physician, “if that opinion is brief, conclusory, and inadequately supported by clinical  
 8 findings.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002)(citation omitted).

9        The federal regulations also provide, as a general rule, that more weight is given to  
 10 treating physicians’ opinions as opposed to non-treating physicians. 20 C.F.R. § 416.927(d).  
 11 This is because treating physicians “are likely to be the medical professionals most able to  
 12 provide a detailed, longitudinal picture of [claimant’s] medical impairment(s)...” *Id.* In  
 13 determining the weight of a treating physician’s opinions, the regulations require the ALJ to  
 14 consider the length of the treatment relationship and frequency of examination; the nature  
 15 and extent of the treatment relationship; the supportability of the physician’s opinions; the  
 16 consistency of the opinion with the record; and any specialization of the physician and other  
 17 factors. 20 C.F.R. § 416.927(d). Additional factors relevant to evaluating any medical  
 18 opinion, not limited to the opinion of the treating physician, include the amount of relevant  
 19 evidence that supports the opinion and the quality of the explanation provided; the  
 20 consistency of the medical opinion with the record as whole; the specialty of the physician  
 21 providing the opinion; and “other factors” such as the degree of understanding a physician  
 22 has of the SSA’s disability programs and their evidentiary requirements and the degree of his  
 23 or her familiarity with other information in the record. 20 C.F.R. § 404.1527(d)(3)-(6). \_

24        Here, Dr. Ridenour’s opinion is uncontroverted and entitled to great weight.  
 25 Moreover, because Dr. Ridenour’s opinion is that of a treating physician, the ALJ could reject  
 26 it only on the basis of specific, clear and convincing reasons, supported by substantial  
 27 evidence. *See Bayliss*, 427 F.3d at 1216 (citation omitted).

1 Dr. Ridenour completed a report dated January 31, 2006, giving his opinion regarding  
2 Plaintiff's ability to do work-related activities. (Tr. 214-216.) Dr. Ridenour rated Plaintiff's  
3 mental ability and aptitude to do work in almost all categories as poor to none as a result of  
4 Plaintiff's anxiety, bipolar disorder, and because he can barely function outside of his home.  
5 (*Id.* at 214-215.) Dr. Ridenour also noted that Plaintiff has high anxiety, severe anger  
6 disorder and poor social interaction, but has the capability to manage his benefits. (*Id.* at  
7 215, 244.) Dr. Ridenour observed that Plaintiff could not sit during a visit; could not hold  
8 down a job; and has gotten out of his car to yell at other drivers. (*Id.* at 244.) Finally, Dr.  
9 Ridenour opined that Plaintiff would not be able to sustain "simple work," and little if any  
10 improvement is expected with treatment. (*Id.*)

11 Dr. Ridenour also submitted a letter dated March 31, 2008 regarding Plaintiff's  
12 condition. (Tr. 269.) He opined that Plaintiff suffers from bipolar disorder and severe anger  
13 disorder and states that these problems were noted in September 1999, but have gone on  
14 much longer. (*Id.*) Dr. Ridenour stated that Plaintiff has not been able to be a part of the  
15 work force because he cannot be away from his home for long and is unable to work with  
16 others. (*Id.*) He commented on an incident where Plaintiff got out of his car and pounded  
17 on another car's window and screamed at the driver, and stated that sometimes Plaintiff's  
18 depression is so bad that he stays in bed. (*Id.*) Finally, Dr. Ridenour opined that  
19 improvement in Plaintiff's mental status is doubtful. (*Id.*)

20 In this case, the ALJ properly discredited the opinion of Plaintiff's treating physician,  
21 Dr. Ridenour, with specific, clear and convincing reasons. The first reason the ALJ gave for  
22 rejecting Dr. Ridenour's opinion was that Dr. Ridenour is an internist and not a psychiatrist  
23 or psychologist, and treatment of a mental impairment was not within his area of specialty.  
24 (Tr. 17.) This circuit has expressly held that it is not necessary that the physician who  
25 presents evidence of mental illness be a board-certified psychiatrist. *Sprague v. Bowen*, 812  
26 F.2d 1226, 1232 (9th Cir. 1987). However, the court finds that this error was harmless as the  
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1 ALJ provided other specific, clear and convincing reasons for rejecting Dr. Ridenour's  
 2 opinion.

3 The second reason the ALJ gave for rejecting Dr. Ridenour's opinion was that he was  
 4 at one time censured for his prescription practices. (Tr. 17.) Plaintiff argues that this reason  
 5 is not supported by the record, however, the Commissioner correctly points out that the State  
 6 agency physician who reviewed Plaintiff's medical records noted Dr. Ridenour's censure. (*Id.*  
 7 at 229.) This reason for rejecting Dr. Ridenour's opinion is therefore supported by  
 8 substantial evidence in the record.

9 The third reason the ALJ gave for rejecting Dr. Ridenour's opinion was that he  
 10 contradicted his own reports and treatment records. (Tr. 16-17.) The ALJ pointed out that  
 11 Dr. Ridenour described Plaintiff as experiencing "road rage"; yet, stated that the claimant  
 12 was not a danger to himself or others. (*Id.* at 17.) Another contradiction noted by the ALJ  
 13 was that Dr. Ridenour opined that Plaintiff was unable to work with others or be away from  
 14 his home, yet in treatment notes dated March 12, 1999, the claimant reported that he was  
 15 going golfing, which does not indicate a person who cannot be away from home or get along  
 16 with others. (*Id.*) The ALJ noted that Plaintiff's earnings records showed substantial gainful  
 17 earnings in 2000, contradicting Dr. Ridenour's opinions about Plaintiff's ability to return to  
 18 the work force. (*Id.*)

19 While Dr. Ridenour opined that Plaintiff had poor or no ability to function in nearly  
 20 every functioning area, he opined that Plaintiff still had the ability to manage his own funds.  
 21 (Tr. 214-216, 241-244.) Dr. Ridenour's treatment notes in April 1999 stated that Plaintiff had  
 22 big mood swings, decreased concentration, forgetfulness, and depression, but notes in July  
 23 1999 said Plaintiff's affect had improved and his insight was better. (*Id.* at 255-256.) Dr.  
 24 Ridenour's treatment notes in September 1999 state that Plaintiff was doing well, getting out,  
 25 playing golf, and that his affect and insight were good. (*Id.* at 255.) In November 1999, Dr.  
 26 Ridenour's treatment notes state that Plaintiff was doing great. (*Id.* at 254.) Dr. Ridenour  
 27 continued to note that Plaintiff's insight and affect were good in December 1999. (*Id.*) These  
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1 treatment notes clearly contradict Dr. Ridenour's opinion in his 2006 report that Plaintiff's  
 2 mental abilities are poor to none in nearly all categories which Dr. Ridenour attributed to  
 3 Plaintiff barely being able to function outside his home. (*Id.* at 214-216, 241-244.)

4 The contradictions noted by the ALJ are supported by substantial evidence in the  
 5 record. Moreover, the ALJ's decision must be upheld if the evidence is susceptible to more  
 6 than one rational interpretation. *Orteza*, 50 F.3d at 749. Accordingly, the ALJ sufficiently  
 7 set forth specific, clear and convincing reasons for rejecting Dr. Ridenour's opinion.

8 **D. PLAINTIFF'S CREDIBILITY**

9 Plaintiff next argues that the ALJ failed to properly evaluate his credibility. (Doc. #  
 10 16 16-18.) Defendant contends that the ALJ properly considered Plaintiff's credibility and  
 11 provided specific, legitimate reasons for rejection. (Doc. # 19 10-12.)

12 “[A] claimant's credibility becomes important at the stage where the ALJ is assessing  
 13 residual functional capacity, because the claimant's subjective statements may tell of greater  
 14 limitations than can medical evidence alone.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1147  
 15 (9th Cir. 2001)(citing Social Security Rule 96-7p (1996)). Thus, a claimant's credibility is  
 16 often crucial to a finding of disability. The ALJ is responsible for determining credibility.  
 17 *Meanel*, 172 F.3d at 1113.

18 In general, when deciding to accept or reject a claimant's subjective symptom  
 19 testimony, an ALJ must perform two stages of analysis: an analysis under *Cotton v. Bowen*,  
 20 799 F.2d 1403 (9th Cir. 1986) (the “*Cotton test*”), and an analysis of the credibility of the  
 21 claimant's testimony regarding the severity of his or her symptoms. *Smolen v. Chater*, 80  
 22 F.3d 1273, 1281 (9th Cir. 1996); *see also* 20 C.F.R. § 404.1529 (adopting two-part test). “If  
 23 the claimant produces evidence to meet the *Cotton test* and there is no evidence of  
 24 malingering, the ALJ can reject the claimant's testimony about the severity of his or her  
 25 symptoms only by offering specific, clear, and convincing reasons for doing so.” *Smolen*, 80  
 26 F.3d at 1281 (citation omitted).

1           Under the *Cotton* test, a claimant who alleges disability based on subjective symptoms  
 2 “must produce objective evidence of an underlying impairment ‘which could reasonably be  
 3 expected to produce pain or other symptoms alleged.’” *Bunnell v. Sullivan*, 947 F.2d 341, 344  
 4 (9th Cir. 1991) (en banc)(citing 42 U.S.C. § 423(d)(5)(A)). This test “imposes only two  
 5 requirements on the claimant: (1) [he or] she must produce objective medical evidence of an  
 6 impairment or impairments; and (2) [he or] she must show that the impairment or  
 7 combination of impairments *could reasonably be expected to* (not that it did in fact) produce  
 8 some degree of symptom.” *Smolen*, 80 F.3d at 1282 (emphasis original); *see also* 20 C.F.R.  
 9 § 404.1529(a)-(b).

10           An ALJ’s credibility findings are entitled to deference if they are supported by  
 11 substantial evidence and are “sufficiently specific to allow a reviewing court to conclude the  
 12 adjudicator rejected the claimant’s testimony on permissible grounds and did not ‘arbitrarily  
 13 discredit a claimant’s [symptom] testimony.’” *Bunnell*, 947 F.2d at 345 (quoting *Elam v.  
 14 Railroad Retirement Bd.*, 921 F.2d 1210, 1215 (11th Cir. 1991)). When analyzing credibility,  
 15 an ALJ may properly consider medical evidence in the analysis. *Rollins v. Massanari*, 261  
 16 F.3d 853, 857 (9th Cir. 2001) (“[w]hile subjective pain testimony cannot be rejected on the  
 17 sole ground that it is not fully corroborated by objective medical evidence, the medical  
 18 evidence is still a relevant factor in determining the severity of the claimant’s pain and its  
 19 disabling effects.”); *see also* *Batson v. Comm’r of Soc. Sec.*, 359 F.3d 1190, 1196 (9<sup>th</sup> Cir.  
 20 2004)(holding ALJ properly determined credibility where claimant’s testimony was  
 21 contradictory to and unsupported by objective medical evidence). An ALJ may consider  
 22 various factors in assessing the credibility of the allegedly disabling subjective symptoms,  
 23 including: daily activities; the location, duration, frequency, and intensity of pain or other  
 24 symptoms; precipitating and aggravating factors; the type, dosage, effectiveness, and side  
 25 effects of any medication taken to alleviate symptoms; treatment, other than medication,  
 26 received for relief of symptoms; any measures a claimant has used to relieve symptoms; and  
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1 other factors concerning functional limitations and restrictions due to symptoms. 20 C.F.R.  
 2 § 404.1529(c)(3)(i)-(vii).

3 The ALJ determined Plaintiff's medically determinable impairments could have been  
 4 reasonably expected to produce the alleged symptoms; therefore, Plaintiff has satisfied the  
 5 first prong of the *Cotton* test. (Tr. 18.) There is no evidence of malingering and the ALJ made  
 6 no such finding. Accordingly, in order to reject Plaintiff's testimony regarding the severity  
 7 of his depression, the ALJ must offer specific, clear and convincing findings supported by the  
 8 record.

9 Plaintiff claimed that he suffered from severe depression which results in confusion,  
 10 poor memory, difficulty concentrating, fits of anger, and panic attacks. (Tr. 91.) The ALJ  
 11 concluded that Plaintiff's statements concerning the intensity, persistence, and limiting  
 12 effects of his symptoms were not entirely credible, and determined that Plaintiff's RFC  
 13 provided that he was able to perform a full range of medium work pursuant to Medical-  
 14 Vocational Rule 203.31. (Tr. 18, 20.) Under Medical-Vocational Rule 203.00, “[t]he  
 15 functional capacity to perform medium work includes the functional capacity to perform  
 16 sedentary, light, and medium work.” 20 C.F.R. pt. 404, subpt. P, app. 2.

17 The ALJ offered sufficiently specific reasons for rejecting Plaintiff's credibility. The  
 18 ALJ's first reason for rejecting Plaintiff's credibility was that Plaintiff's daily activities  
 19 including driving a vehicle, running errands, working in his backyard and playing golf did not  
 20 indicate a disabling level of impairment of Plaintiff's RFC. (Tr. 18.) Daily activities are  
 21 grounds for an adverse credibility finding if the Plaintiff can perform physical functions that  
 22 transfer to the workplace. *Orn v. Astrue*, 495 F.3d 625, 636, 639 (9th Cir. 2007) (citations  
 23 omitted); see also *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (giving the following  
 24 example: “[I]f, despite his claims of pain, a claimant is able to perform household chores and  
 25 other activities that involve many of the same physical tasks as a particular job, it would not  
 26 be farfetched for an ALJ to conclude that the claimant's pain does not prevent the claimant  
 27 from working.”). However, the Ninth Circuit has recognized that “[t]his line of reasoning has

1 its limits: The Social Security Act does not require that claimants be utterly incapacitated to  
 2 be eligible for benefits.” *Fair*, 885 F.2d at 603 (citations omitted). There are two ways that  
 3 daily activities can form the basis of an adverse credibility determination: (1) the daily  
 4 activities contradict the claimant’s other testimony; or (2) the “claimant is able to spend a  
 5 substantial part of his day engaged in pursuits involving the performance of physical  
 6 functions that are transferable to a work setting.” *Orn*, 495 F.3d at 639 (quoting *Fair*, 885  
 7 F.2d at 603). If the ALJ is relying on the second ground, he or she must make “specific  
 8 findings relating to [the daily] activities and their transferability to conclude that a claimant’s  
 9 daily activities warrant an adverse credibility determination.” *Id.* (citation omitted).

10 Here, the ALJ’s adverse credibility determination relied on the first ground- that  
 11 Plaintiff’s daily activities contradicted his other statements regarding his limitations.  
 12 Plaintiff’s claims that he could not be away from his home, was confused, and had difficulty  
 13 concentrating, are contradicted by Plaintiff’s activities of playing golf, working in the yard,  
 14 driving a vehicle, and running errands. (Tr. 188, 254-256.) Thus, the ALJ’s reasoning here  
 15 was proper.

16 The ALJ’s second and third reasons for rejecting Plaintiff’s credibility were that  
 17 Plaintiff’s description of the severity of his symptoms was contradicted by the fact that when  
 18 Plaintiff was seen for follow-up visits in March and April 1999, he reported feeling better,  
 19 with less anxiety, less panic, and less co-dependence, better insight and affect, and was  
 20 getting out. (Tr. 18.) These reasons are supported by substantial evidence in the record.  
 21 (*Id.* at 188, 254-256.)

22 The ALJ’s fourth reason for rejecting Plaintiff’s credibility was that Dr. Ridenour’s  
 23 notes indicated that Plaintiff was working full-time from November 1999-March 15, 2000.  
 24 (Tr. 18.) While Plaintiff points out that this was only for a short period of time, it does serve  
 25 to contradict Plaintiff’s claims as to the severity of his disability.

26 The ALJ’s fifth reason for rejecting Plaintiff’s credibility was that from June 21, 2000  
 27 to the end of 2000, there were only five appointments, showing medications but no progress  
 28

1 notes, indicating that Plaintiff was stable and doing okay. (Tr. 18.) The ALJ's sixth reason  
 2 for rejecting Plaintiff's credibility was that there are scant treatment notes regarding  
 3 Plaintiff's impairments during the period at issue and no treatment notes from a mental  
 4 health professional. (*Id.*) While lack of medical evidence cannot form the sole basis for  
 5 discounting credibility, it is a factor the ALJ may consider in his credibility analysis. *Burch*,  
 6 400 F.3d at 681. The ALJ properly used the lack of objective medical evidence for the period  
 7 at issue as a factor to reveal that treatment records were not consistent with Plaintiff's  
 8 asserted symptoms or limitations.

9 The ALJ's seventh reason for rejecting Plaintiff's credibility was that no physician  
 10 opined that listing level impairments were met or equaled for the relevant time period. (Tr.  
 11 18.) Plaintiff argues that the ALJ ignored the opinion of Dr. Ridenour, however, this court  
 12 found (*supra*, III.C) that the ALJ properly rejected Dr. Ridenour's opinion. Therefore, this  
 13 reason is supported by substantial evidence.

14 The ALJ's eighth and final reason for rejecting Plaintiff's credibility was that the  
 15 objective evidence of Plaintiff's medical record, for the relevant time period, did not establish  
 16 impairments likely to produce disabling pain or other limitations as alleged for a period of  
 17 twelve or more continuous months. (Tr. 18.) Plaintiff's earning records establish that he  
 18 engaged in substantial gainful activity in 2000 (*Id.* at 84), supporting the ALJ's  
 19 determination that Plaintiff's impairments were not disabling for the requisite duration  
 20 period of twelve continuous months. 20 C.F.R. § 404.1509. Moreover, the medical records  
 21 do not reveal an impairment that was disabling for a continuous period of twelve months.

22 Although the evidence may offer a more favorable interpretation to Plaintiff, the ALJ's  
 23 interpretation is rational, and the court "must uphold the ALJ's decision where the evidence  
 24 is susceptible to more than one rational interpretation." *Burch*, 400 F.3d at 680-81 (citation  
 25 omitted). Questions of credibility are for the ALJ to decide, and "where...the ALJ has made  
 26 specific findings justifying a decision to disbelieve an allegation...and those findings are  
 27 supported by substantial evidence in the record, [the court's] role is not to second guess that

1 decision.” *Fair*, 885 F.2d at 604. Therefore, the court finds that the ALJ did not commit  
 2 legal error, and substantial evidence supports his adverse credibility determination.

3 **E. ALJ’S FINDINGS AT STEP TWO**

4 Plaintiff argues that the ALJ failed to make complete findings at Step Two. (Doc. # 16  
 5 18-19.) Specifically, Plaintiff asserts that the ALJ erred in failing to make any findings with  
 6 respect to an evaluation of Plaintiff’s other psychological disorders (bipolar disorder, anxiety  
 7 disorder, anger disorder, agoraphobia, impulse disorder, and violence) and only made a  
 8 finding with respect to Plaintiff’s depression. (*Id.*) Defendant contends that it was Plaintiff’s  
 9 burden to establish a disabling impairment on or before his date last insured, September 30,  
 10 1999, and Dr. Ridenour only diagnosed Plaintiff with depression during the relevant time  
 11 period. (Doc. # 19 12-13.)

12 Plaintiff carries the initial burden of establishing that his severe mental impairments  
 13 significantly limit his ability to perform basic work activities. *Swenson v. Sullivan*, 876 F.2d  
 14 683, 687 (9th Cir. 1989). He must provide medical evidence showing how severe his mental  
 15 impairments are during the time disability is alleged. 20 C.F.R. §§ 404.1512(c), 416.912(c).

16 The Commissioner is correct that the record only reflects a diagnosis of depression  
 17 during the relevant time period. While there is a notation about anxiety, there is nothing in  
 18 the record to indicate this or any of the other psychological disorders were a severe mental  
 19 impairment that significantly limited Plaintiff’s ability to perform basic work activities.  
 20 Therefore, the ALJ did not err by failing to make findings with respect to an evaluation of  
 21 Plaintiff’s other psychological disorders.

22 **F. VOCATIONAL EXPERT TESTIMONY**

23 Lastly, Plaintiff argues that the ALJ erred by failing to take vocational expert  
 24 testimony. (Doc. # 16 19-20.) Plaintiff asserts that it is inconsistent for the ALJ to find at step  
 25 2, that Plaintiff’s depression is a severe impairment which has vocational ramifications, and  
 26 then not include limitations based on this impairment in Plaintiff’s RFC assessment because  
 27 a depressive disorder impairment would likely create non-exertional limitations. (*Id.*)

1 Plaintiff reasons that non-exertional limitations call for the testimony of a vocational expert  
 2 to opine regarding the effects of the limitations on the occupational base at step 5. (*Id.* at 20.)  
 3 Finally, Plaintiff contends that the ALJ should not have relied on the Medical-Vocational  
 4 Guidelines (the Grids) because of the non-exertional limitations. (*Id.*)

5 Defendant argues that Plaintiff failed to provide credible objective medical evidence  
 6 that Plaintiff had non-exertional limitations during the relevant time period, so there was no  
 7 error in not considering vocational expert testimony, and reliance on the Grids was proper.  
 8 (Doc. # 19 13-14.)

9 A step five determination is made on the basis of four factors: the claimant's RFC, age,  
 10 education and work experience. *Hoopai v. Astrue*, 499 F.3d 1071, 1075 (9th Cir. 2007). "To  
 11 assist in the step-five determination, the Social Security Administration established [the  
 12 Grids], which consist of a matrix of [the four factors] and set forth rules that identify whether  
 13 jobs requiring a specific combination of these factors exist in significant numbers in the  
 14 national economy." *Id.* (citation omitted); *see also* 20 C.F.R. pt. 404, subpt. P, app. 2, §  
 15 200.00(b). "When the grids match the claimant's qualifications, the guidelines direct a  
 16 conclusion as to whether work exists that the claimant could perform." *Hoopai*, 499 F.3d at  
 17 1075 (citation omitted). If the grids do not match all of the claimant's qualifications, the ALJ  
 18 may use them as a framework to make a determination of what work exists or the ALJ may  
 19 obtain testimony of a vocational expert. *Id.*; *see also* 20 C.F.R. pt. 404, subpt. P, app. 2. The  
 20 grids can be used if there are both exertional and non-exertional limitations present. *Hoopai*,  
 21 499 F.3d at 1075; *see also Tackett v. Apfel*, 180 F.3d 1094, 1102 (9th Cir. 1999) ("the fact  
 22 that a non-exertional limitation is alleged does not automatically preclude application of the  
 23 grids.").<sup>2</sup> The Grids are inapplicable and a vocational expert is required only "[w]hen a  
 24 claimant's non-exertional limitations are 'sufficiently severe' so as to significantly limit the  
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26       <sup>2</sup> "A non-exertional impairment is an impairment 'that limits [the claimant's] ability to work  
 27 without directly affecting his [ ] strength.'" *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (citation  
 omitted).

1 range of work permitted by the claimant's exertional limitations." *Hoppai*, 499 F.3d at 1075  
 2 (citation omitted). While depression has been found to be a non-exertional disorder, mild  
 3 or moderate depression is not a sufficiently severe non-exertional limitation that will  
 4 preclude an ALJ's reliance on the Grids and require the assistance of a vocational expert. *Id.*  
 5 at 1076-77.

6 The fact that a non-exertional mental impairment is found to be "severe" at the second  
 7 step does not render it "sufficiently severe" to require the use of a vocational expert. *Hoopai*,  
 8 499 F.3d at 1076. In fact, the non-exertional limitation must be more than "severe" at step  
 9 two to require the use of a vocational expert. *Id.* This is because the step two determination  
 10 is "merely a threshold determination of whether the claimant is able to perform his past  
 11 work." *Id.* At step five, there must be a "significant and 'sufficiently severe' non-exertional  
 12 limitation not accounted for in the grid" and "the severity of the limitations at step five that  
 13 would require use of a vocational expert must be greater than the severity of impairments  
 14 determined at step two..." *Id.*

15 Plaintiff's argument that the ALJ's reliance on the Grids was in error and that the ALJ  
 16 was required to obtain testimony from a vocational expert lacks merit. Substantial evidence  
 17 supports the ALJ's determination that Plaintiff's depression was not a sufficiently severe non-  
 18 exertional limitation that required the assistance of a vocational expert. The ALJ properly  
 19 rejected the opinion of Plaintiff's treating physician, Dr. Ridenour (*supra*, III.C), and  
 20 properly discredited Plaintiff's own statements regarding his limitations (*supra*, III.D). The  
 21 ALJ found that Plaintiff had mild restriction in activities of daily living (Tr. 15); mild  
 22 difficulties in social functioning and with regard to concentration, persistence or pace (*Id.*);  
 23 and no episodes of decompensation (*Id.*). Based on all the evidence in the record the ALJ  
 24 concluded that through the date last insured, Plaintiff had the RFC to perform the full range  
 25 of medium work as defined in 20 C.F.R. § 404.1567(c). (*Id.*) In *Hoopai*, the plaintiff was  
 26 similarly found to have moderate limitations, and the court determined that such moderate

1 limitations would not significantly limit plaintiff's ability such that vocational testimony was  
2 required. *Hoopai*, 499 F.3d at 1077.

3 Accordingly, the ALJ did not commit error in his use of the Grids as a framework in  
4 his determination.

5 **IV. CONCLUSION**

6 After carefully reviewing the record as a whole, the district court should find there is  
7 substantial evidence to support the ALJ's determination.

8 **RECOMMENDATION**

9 **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for Remand (Doc. #16)  
10 be **DENIED**.

11 **IT IS FURTHER RECOMMENDED** that Defendant's Cross-Motion for Summary  
12 Judgment (Doc. #19) be **GRANTED** and that the decision of the ALJ be **AFFIRMED**.

13 DATED: October 12, 2010.



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15 UNITED STATES MAGISTRATE JUDGE  
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